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OCTOBER TERM, 1905.

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THE MICHIGAN CENTRAL RAILROAD COMPANY,
APPELLANT,

v.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN.

BRIEF OF THE ATTORNEY GENERAL ON THE CONSTITUTIONAL AND ASSOCIATED QUESTIONS.

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Statement.

The Michigan system for the taxation of the property of railroad corporations, passed in 1901, provides for its assessment by a state board of assessors. After making assessments, based on reports made by the railroad companies, and such other information as can be secured, taxes are spread thereon at the average rate imposed upon other property taxed throughout the state for state, county, township, school, and municipal purposes.

This average rate is to be ascertained from year to year, by dividing the aggregate taxes levied throughout the state for the purposes mentioned, by the aggregate assessments of the property upon which those taxes are spread.

The features in the act of 1901, and the constitutional amendments upon which it was based, which are peculiar to the system invoked, and material to the questions here involved, are the following:

1. The selection for the operation of the system, of the property of railroad, union station and depot, express, car-loaning, stock and refrigerator car corporations, etc.

2. The assessment of the property of these companies by a separate, distinct, and newly created state board.

3. The imposition upon those assessments of the average rate of taxation levied upon the other property of the state taxed for state, county, township, school, and municipal purposes.

4. That the average rate of taxation is determined by dividing the aggregate taxes levied throughout the state for state, county, township, school, and municipal purposes by the aggregate assessments upon which those taxes are levied.

5. That the deduction of debts from credits is expressly provided for in assessments of property taxed generally throughout the state, but is not in terms provided for in act 173 of 1901.

6. That equalization is had of the assessments of all property in the state except that taxed under act 173 of 1901.

ARGUMENT.

The Propriety of Classification in General and of the Classification Made by Act 173 of 1901.

I.

In general.—The questions of classification presented in this case are not in themselves novel. Similar questions have many times been presented to and adjudicated by this court. In respect, however, to the difference of treatment which may be made of the several classes, when once the classification is made, certain questions not specifically considered in the former cases, are presented, which we believe to be fully covered by the general principles which have been laid down.

The fourteenth amendment applies in matters of taxation, but it does not prevent classification. The state may, notwithstanding the requirement of equal protection of the laws, regulate its system of taxation in all proper and reasonable ways, and make such classifications as proceed within reasonable limits and general usage.

To sustain this proposition, the citation of cases is unnecessary, as the rule has become commonplace.

In matters of taxation the courts are moved by different considerations, and different rules apply in determining the validity of those statutes and the classifications made thereby than apply in cases of statutes and classification for other purposes.

The character of the right of taxation, the necessity for its continued existence, and the effort on the part of the courts to limit its application as little as possible, have led to rules in the application of the fourteenth amendment which are peculiar to it, and this court has, in a number of

cases, sustained statutes relating to taxation, which, had they related to police regulations or kindred subjects, would have been declared to violate the requirement of equal protection of laws.

Connolly *v.* Union Sewer Pipe Company, 184 U. S., 562, 563;

American Sugar Refining Company *v.* Louisiana, 179 U. S., 89;

Cook *v.* Marshall County, 196 U. S., 269, 274.

That all classification must bear a just and reasonable relation to the purposes for which it is made, is the rule applied in the application of the fourteenth amendment, but in matters of taxation, this rule has a limited application, and the discretion of the legislature is given more full effect than in cases of classification for other purposes.

In cases other than of taxation, the court must be able to see some reasonable distinction between the classes which bears an appropriate relation to the classification made. In cases of taxation this is unnecessary, and all that the court requires to sustain an enactment when brought into question as contravening that amendment, is that there be some difference in the different classes. If once it appears that there is a difference in the classes, it is left to the legislative discretion to determine whether it is sufficient to justify the classification made. In other words, in matters of taxation, the question of the propriety and necessity of classification is fully left to the legislative discretion. While the rule has never been expressed in this language, still such is the necessary effect of *Billings v. Illinois,* 188 U. S., 102. If there could be a case of classification for the purpose of taxation obnoxious to the provisions of the fourteenth amendment, that case furnishes an example of it. There, the inheritance tax statute of the state of Illinois left untaxed life estates where the remainder was to a stranger of the blood or collateral heir, and taxed the life estate where the remainder

was to a lineal descendant. The tax was a burden upon the estate of the life tenant. The only difference between the character of the interest or succession of the life tenants in the different classes, was in reference to something which did not affect, either by enlargement or restriction, their right of enjoyment of the interest received. The interest received in each case was identical. In the one case the remainder passed to persons of one description, and in the other to persons of a different description. No apparent reason existed why there should be a difference of treatment of the different life tenants. The statute was sustained in an opinion by Mr. Justice McKenna, who, in strong language, reaffirmed the right of the states to exercise practically unlimited discretion in making classification for taxation purposes.

II.

A. *In particular.—The questions of classification presented in this case.*

As has been seen, act 173 selects for the purpose of its operation, the property of certain public service corporations, being railroad, union station and depot, express, car loaning, stock and refrigerator car, and fast freight line companies.

In this proceeding we are concerned only with the classification as applied to and examined from the standpoint of the railroad corporations, as the complainant in this case is, and the complainants in associated cases are, railroad corporations only.

The propriety of the selection of railroad corporations to constitute a separate and distinct class for taxation purposes has been many times questioned in this court, and without exception it has been held by it that their property, by reason of the peculiar use to which it is put, situation in which found, and conditions under which it exists, is particularly

appropriate to be made the subject of a separate and distinct system of taxation, and statutes making a separation of railroad from other property for the imposition of taxes thereon by a peculiar system have been universally sustained.

Upon this question the citation of cases seems hardly necessary, as beginning with the *State Railroad Tax Cases,* 92 U. S., 575, and continuing to *Florida, &c., R. R. Co. v. Reynolds,* 183 U. S., 480, the reports of the decisions of this court contain an unbroken line of cases sustaining the authority of the state in this regard.

In *Columbus Southern Railway Company v. Wright,* 151 U. S., 470, in sustaining a statute making a separate classification of property of railroad corporations, the court said:

"This is hardly an open question. Various modes of taxing railroad property are adopted by the different states. In some, railroad companies are taxed upon their property as a unit. In others, the road and property in each county are separately assessed, and in still other states, the whole road is assessed, and then the assessment apportioned among the several counties and towns. These and all similar modes of taxation are subject to the legislative discretion of the respective states and do not ordinarily present any Federal question whatever" (151 U. S., 478).

B. It is claimed that there is property of the same character, put to the same use, and in the same situation in Michigan as that belonging to railroad corporations which is owned by unincorporated institutions and by persons. While this is denied, it may not be out of place to indicate that there are differences in the character of railroad corporations, and in the privileges, rights and franchises which they enjoy as corporations, from other corporations and from persons, which would justify the state in making classification of their property upon the basis of its ownership by railroad corporations.

This question has never been squarely presented to and

passed upon by this court, but we believe that the following will be found to be sufficient difference to justify such classification:

1. The railroad corporation is endowed with certain specific rights by statute, which are not given to other institutions or corporations or to persons. Thus, the right of eminent domain is conferred upon it; it is permitted to have perpetual succession; it is given the use of a large amount of public property—the right to cross streets and highways; the power to enforce connection with other similar companies; also the right of succession to the franchises of previously existing corporations is permitted to purchasing corporations.

2. The railroad corporation also possesses elements which, in a large degree, create for it intangible values in a manner different from other corporations, institutions, or persons. Thus, these values exist more permanently with a railroad corporation; its business is, in a sense, monopolistic; it is peculiarly benefited by the growth of territory, and in its business, economies are made possible by increased density of traffic.

3. The railroad corporation is engaged in a public service, in which the state might engage, and over which the state continues to exercise the right of control.

Cotting *v.* Goddard, 183 U. S., 93-4.

This is referred to only as indicating the different character of the business which it carries, and is permitted to carry on.

4. The railroad corporation has, in a large degree, received public aid.

5. It has undertaken to permit legislation with regard to it, by organizing under a statute reserving the right to alter,

amend, or repeal. This has been held by this court to permit the application of one rule to railroad corporations, and another rule to persons engaged in carrying on a business of the same character.

St. Louis, I. M. & S. R'y Co. *v.* Paul, 173 U. S., 408-9.

C. The following additional elements surround railroad property in Michigan, and permit of its separate classification for taxation purposes:

1. It has always been assessed according to a separate and distinct system, and all Michigan railroads are incorporated under a statute which at the time of their incorporation provided for a distinct and separate system of taxation.

2. Their property is of such character, extending through numerous municipalities throughout the state, that assessment by the unit system is imperative, in order that the entire value of the railroad system be secured. In this respect, they differ from persons, and other classes of corporations, except possibly interurban street railways.

3. The rates of railroad companies are regulated by statute in Michigan, and the necessary relation which exists between income and taxation, permits of the separate classification of institutions whose rates of income are limited.

D. 1. Act 173 of 1901 does not, however, attempt to make any classification upon the basis of corporate or railroad ownership. It inaugurates a classification based upon a difference in use, rather than a difference in ownership, and includes within its terms only that property belonging to railroad corporations which is engaged in carrying on their railroad business.

2. In making railroad property a separate class, it does so for the purpose of the imposition of a different burden than

that imposed upon the other classes. The railroad property is especially adapted to bear state, rather than local, taxes, and when property is adapted to selection, and is selected for the bearing of a tax of a particular character, that fact in itself constitutes a sufficient basis of distinction and classification separate from other property.

Travellers' Life Insurance Co. *v.* Connecticut, 185 U. S., 364.

III.

The Property of Sleeping Car and Interurban Street Railway Companies and Unincorporated Railroads.

The objection is made that each of these institutions possesses property of the same character, engaged in the same use, and existing under the same conditions as that of complainant.

In our principal brief we have pointed out at length the elements of difference between the property of these companies and institutions, and the business in which engaged, from complainant's, and this brief will be confined to a statement of several considerations which are regarded as controlling:

1. The complainant has not shown any injury resulting from the property of these corporations and institutions not being included in the same system with its property. Its assessment would be the same in amount if that property were exempted from taxation. With that property thrown into the class upon which taxes for state, county, township, school, and municipal purposes are levied, instead of the complainant and similar companies being injured thereby, they are in fact, materially benefited. As the property subject to general taxation for the purposes mentioned increases, the

average rate decreases, and the railroad property thereby benefits. This is conclusive of the question.

2. The authority exists in the state to grant exemption from taxation. It is true that this exemption should be based upon proper classification, although this is probably not imperative. The property of any of these specific companies or institutions might have been exempted entirely from taxation, and the complainant would have no ground of complaint, as its taxation would not be increased or decreased thereby. This question is controlled by *Missouri v. Dockery*, 191 U. S., 170, 171, in which case a citizen of Missouri having property assessed for taxation, applied for mandamus to compel a certain state board to increase assessments of railroad and other property which were assessed at a percentage of their value, while his property was assessed at its full value. It was admitted that the petitioner's tax was correct, and that the property of the railroad companies could have been exempted entirely, and the court, therefore, refused relief.

IV.

The Deduction of Debts from Credits Granted to Property Owners Generally, but Claimed to Be Denied to Corporations Taxed Under Act 173.

All credits assessed under the general tax law in Michigan are entitled to a deduction to the amount of the debits of the owner. Complainant insists that a similar deduction is not permitted, and was not given in the assessment for 1902, under the act 173 of 1901:

1. The record (R., 431-438) shows conclusively that credits were not included, which indicates a construction, upon the part of the board of assessors, of act 173 as authoriz-

ing it to grant the deduction (which construction was proper, in view of the fact that, that act contains no specific requirement of the inclusion of credits without deduction, and as if necessary to render the act constitutional, those credits should be eliminated, and the statute would be construed in connection with the fourteenth amendment as authorizing and requiring their elimination in the same manner as it was given under the general tax law. *First National Bank of St. Joseph v. St. Joseph,* 46 Michigan, 529), and the construction of the board of assessors would be given controlling weight in a doubtful case.

Attorney General *v.* Glaser, 102 Michigan, 405.

2. As has been stated, the purpose of act 173 was to include only railroad property. If credits are included at all, it is because they are railroad credits, and thus they are railroad property. That they are railroad property may be considered as adjudicated.

Chamberlain *v.* Walter, 60 Federal, 788-793;
McHenry *v.* Alford, 168 U. S., 651-656;
Detroit, Grand Rapids & Western R. R. Co. *v.* Railroad Commissioners, 119 Michigan, 132.

3. If any invalidity of act 173 is brought about through the inclusion of credits without deduction for debts, the act is not thereby rendered wholly unconstitutional, but only so far as it prevents the deduction. It would, therefore, be valid as an entirety in cases where there were debts to be deducted, but no deduction was claimed.

Supervisors *v.* Stanley, 105 U. S., 305.

4. The complainant has made no showing that it possesses any credits not a part of its railroad property and growing out of its railroad business, or that it appeared before the board of review and claimed a deduction on account of indebtedness. Ample opportunity for hearing, and for making

the claim for deduction upon review was given, but the fact is, that the claim for deduction on that account was not made. The result is that the deduction cannot now be claimed.

First National Bank of St. Joseph *v.* St. Joseph, 46 Mich., 526.

V.

Is the Rate Fixed in and by the Constitution, or is it Dependent upon and Fixed by the Action of Local Municipal Officers?

We insist that it is fixed by the constitution, and by the legislature. The legislature selects the corporations to constitute the class upon which the average rate required by the constitution automatically applies.

For very apparent reasons, the fixing of the rate is not the action of the local officials or municipalities:

1. They exercise absolutely no discretion over it. The discretion is exercised by the legislature and by the people in amending their constitution, and where the discretion is exercised, necessarily, there the rate is fixed, rather than by an officer who merely incidentally affects the rate, but has no discretion in regard to it.

2. The local officer is given no authority by act 173, or by the constitutional amendments, in regard to the rate. His action, and that of the local municipalities, is controlled by statutes in force before the present system was provided for, and would exist in exactly the same manner as now, if that system were abrogated. Can it be possible that so important a feature as fixing the rate of taxation to be imposed under the system invoked by act 173, is placed upon the local officers in any such manner?

3. The local officer acts for his local municipality; the result of his action becomes a fact of record—that fact of record is made the basis of measurement by the constitution, for the fixing of the rate to be applied to the corporation taxed under act 173. Thus, it is not the discretion of the local officer or municipality that is referred to, but the figures and facts and records which have come into existence by reason of his or its exercise of discretion for local purposes only. The case of *Trowbridge v. Detroit*, 99 Mich., 442, is in point here. In that case the rate of taxation was made to depend upon the award of a jury, and the tax was sustained.

4. If power over the rate is delegated, the delegation finds its source in the constitution, and there is no objection in the federal constitution to the delegation by a state of the authority to fix a tax rate on any body which it sees fit to constitute and endow with that authority.

5. In principle, the reference to the action of local authorities for the data to determine this rate, is no different than as if the fact, as appearing upon their records in a past year had been taken. The effect is the same. When the data is taken it has become a fact which is unchangeable.

The question of the rate of taxation, whether fixed in the constitution or by the legislature, is one over which that body and the people have unlimited discretion, and they are not subject to control in the courts, regardless of their motives for fixing or the basis upon which they fix a particular tax rate. The validity of taxation can in no way depend upon the mode of measurement. The *rate* can depend upon matters over which the legislature has no discretion, such as the receipts from interstate commerce, and the amount of property invested in United States bonds, but if the taxes are,

when levied, placed upon property properly subject to taxation, the method which was pursued in determining the rate and basis of measurement used therefor are not open to question. In the case of *Maine v. Grand Trunk,* 142 U. S., 217, 228-9, the rule is thus stated:

"The character of the tax or its validity is not determined by the modes adopted in fixing its amount for any specific period, or the times of its payment."

Home Life Insurance Co. *v.* New York, 13 N. Y., 594, 660.

VI.

The Average Rate System as Compelling the Payment of Taxes Based Upon the Expenditures of Local Municipalities in Which Complainant Has no Property, and from Whose Disbursements it Receives no Benefit.

1. A material point of consideration is, that the tax imposed by act 173, is a state tax distinct and separate from the taxes imposed by the local municipalities. The railroad is not taxed for local purposes, but bears a burden imposed by the state in lieu thereof. In adjusting the amount of this separate taxation, and in order to secure equality of burden, reference is necessarily made to the tax rate of the local municipality, and the average of all the municipalities in the state is used. The railroad is not *directly* taxed for any disbursement of the local municipalities, whether for governmental or for private purposes, and hence, it is not, by the system imposed, burdened with any taxes of any municipality from which it does not benefit.

2. The complainant's case proceeds upon the theory that its property might be taxed at the rates of the municipalities in which that property exists, constituted of taxes for governmental and private purposes.

The railroad property is different from all other property, in existing in numerous separate municipalities. There is no difference in principle, in taxing at the average in the separate municipalities in which the railroad has property, and at the average in all of the municipalities of the state. The state, having the right to tax at the rate within the municipalities in which the railroad has property, it might relinquish those taxes, and in lieu thereof tax at a rate made up of the average throughout the entire state. The case in hand is, however, different from this; having the right to tax at the rate in the local municipalities in which the railroad has property, and also having the right to subject it to separate taxes for state purposes, the state has subjected it to the separate state tax, and fixed the rate as the average of all the municipalities of the state.

3. The complainant's contention comes to this: That the state is arbitrarily confined, in fixing the tax rate, to a reference to the taxes of the local municipalities in which a particular railroad owns property, which necessarily limits the territory to a strip six miles in width on each side of the railroad's right of way, when, in fact, the railroad is directly benefited by a much wider territory than this.

4. What act 173 in substance does is to district the state for the purpose of the taxation of railroad companies; it makes of the state a single district, and uses, in determining the rate to be applied to it, the average of all of the taxes of that district. The boundaries of local municipalities become and are unimportant, and justly so, as the boundaries of the local municipalities bear no relation to the railroad company to the character of its property or business, or to the benefits which it derives from the surrounding territory.

The authority of the state to arrange taxing districts and to apportion the burden which shall be borne by property

therein, without criticism on the ground that the burdens are unequally apportioned, is clearly sustained.

Williams *v.* Eggleston, 170 U. S., 310, 311;
Forsyth *v.* Hammond, 166 U. S., 518;
Kelley *v.* Pittsburgh, 104 U. S., 78.

It is no objection to a tax that the party required to pay it receives no benefit from the particular burden.

Thomas *v.* Gay, 169 U. S., 280.

5. In fixing the average rate for the taxation of railroads the question presented was not the rate of taxation of a particular railroad, but of a fair rate for all of the railroads of the state, regardless of the municipalities in which located. Their property is all of a similar character, and it is but just and proper that all of such property of similar character should be taxed at the same rate, rather than by different rates, for the purpose of making it conform to the local assessments. To have taxed at the rate imposed by local assessments would have imposed a varying rate upon railroad property, ranging from $8.58 to $28.55 per $1,000 of valuation.

6. The statement that the raiload corporations receive no benefit from disbursements made by municipalities in which they have no property, is entirely erroneous. If any particular property receives benefits from such disbursements, it is the property of railroad corporations. The reasons why they derive benefit from such disbursements are obvious—their business is drawn from all parts of the state, regardless of the fact that a particular portion of the state may not be directly reached by the line of a particular company; the prosperity and advantages of the citizens of a particular municipality inures to the benefit of the railroad, in that travel and transportation are thereby stimulated and increased.

VII.

The Right of Hearing Under Act 173.

1. The only discretion reposed in any officer by that act, is in the board of assessors in making the assessments. There a hearing is by the statute granted. In all other respects, including the action of the board in fixing the rate, the tax is fixed and levied by ministerial action, and as a hearing would not change the result, right of hearing is not essential.

Hagar *v.* Reclamation District, 111 U. S., 708, 709.

Where the legislature or the people by constitution, fix the rate, opportunity for hearing thereon is not essential. The power is governmental, and the subject is committed to the absolute discretion of the legislature.

Spencer *v.* Merchant, 125 U. S., 354.

The right of petition is referred to by complainant's counsel, as giving the right of hearing before the legislature, and it is objected that act 173 denies from year to year the opportunity for hearing before the legislature that is granted as to other taxes.

As full a right of hearing is accorded here as in any case of a legislative rate. The right of hearing exists:

(1.) Before the legislature which proposed the constitutional amendments for adoption.

(2.) Before the people in adopting the amendments.

(3.) Before the legislature in selecting the corporations to be made a separate class for taxation under act 173, and continues to exist at each session of the legislature, and each legislature can be appealed to for the purpose of withdrawing the system of taxation imposed by act 173 in its entirety, or certain corporations from its operation.

This existing and continuing right of hearing satisfies every requirement of the right of petition, and the legislature, by refraining from year to year from readjusting, or refixing the rate, must be considered as permitting it, and as fixing it as fully as though it directly acted upon it, by altering the corporations embraced within the system each year.

VIII.

That the System Imposed by Act 173 Does Not Make or Permit a Determination of the Needs of the Fund Benefited in Each Year.

1. No requirement of the state or national constitution has been pointed out as requiring a specific determination of the needs of government, or of the fund benefited. It is true that taxes are limited to private purposes, and that on the whole, the needs of government cannot be exceeded in taxes levied, but there is no requirement that the legislature, or particularly the people by their constitution, are required to annually determine the needs of government, as bearing upon any separate class of property. If any requirement of this sort exists, it is that the entire tax levied shall not exceed the amount which can properly be used for public purposes, and if, upon any part of that tax the legislature acts annually, it must be said that there is annual legislative determination, that the amounts raised will not exceed the necessities of government.

2. Act 173 and the constitutional amendments do constitute a determination that the amount therein levied will be needed for the purposes for which levied. This is a necessary result of the constitutional and statutory provision providing a tax rate. The fixing of the rate involves the determination, not only of its amount, but of every

question embraced within it, and a state constitution declaring a tax rate is not to be set aside for any fanciful reason based entirely upon conjecture.

3. As full a determination of the needs of government in each year takes place by this system as takes place where a continuing, specified rate is designated in the statute. The designation of such a rate has always been practiced in Michigan, and is admitted by complainant's counsel to be proper. In a case of that kind the legislature does not act upon the rate from year to year, and in originally adopting it, it knows no more of the amount to be derived from the operation of the system and the application of the rate than it does in this case. If one case is a determination of the needs of government, the other is likewise so.

In either case the right of petition exists. The legislature, in permitting the rate from year to year to continue as to specified property or corporations, in substance, in each year, determines that that rate will be sufficient and appropriate, and the constitution requires nothing more.

4. The power of taxation is legislative only because the constitution has made it so. The people in their constitution might fix all of the tax rates, or might designate particular officers with discretion to fix them, and no requirement of the federal constitution would be violated. In this case, the constitution itself has fixed the rate; the legislative enactment gives it operation, and no discretion is anywhere exercised which could be said to constitute a determination of the needs of government other than by the constitution and legislature.

5. Presumptively, the amounts derived under act 173 do not exceed the needs of government, and the court certainly will not interfere with the system until this presumption has been overcome, which has not been attempted in this case.

6. The needs of government are as fully taken into consideration in act 173 as in any statute fixing a tax rate. Assuming, however, that this is not so, the system would not thereby be invalid, as measured by the fourteenth amendment, as

(*a.*) The same reasons do not exist in this case for the legislature's determining the needs of government, as the tax rate is fixed in the constitution.

(*b.*) Railroad property forms a distinct class, to which may be applied separate incidents of taxation.

(*c.*) The tax rate is fixed in a different manner, and the tax is for a distinct purpose, which is a basis for separate classification, the same as is a difference in the property to be taxed.

IX.

Discrimination Resulting from Failure to State the Tax and its Object.

1. The contention is that in Michigan every other tax law is required to state the tax and its object, which is not done in the case of the tax imposed by act 173.

In the *first* place: It is not essential that this statute state the tax, or its object.

(*a.*) The tax is fixed in the constitution, and unless the language there used is sufficient to state the tax or its object, it must be regarded as an exception to the general rule.

(*b.*) The provision requiring a tax law to state the tax and its object applies only to those taxes recurring annually and those imposed generally upon the entire property of the state.

Matter of McPherson, 104 N. Y., 306, 318.

In the *second* place: The tax and its object are stated. The constitution contains every feature necessary to render certain the rate, without recourse to any discretion. This is a sufficient statement of the tax.

People *v.* Mahaney, 13 Mich., 499;
Trowbridge *v.* Detroit, 99 Mich., 443;
Iverson Brown's Case, 91 Va., 778.

In *Trowbridge v. Detroit,* a reference to a jury to fix the amount of the tax provided for in the statute, was held to properly state the tax and its object, and in *People v. Mahaney,* a law fixing an annual tax dependent upon the estimate of certain officers, was held to distinctly state the tax.

The assignment of error relates particularly to the violation of the fourteenth amendment, and this objection is answered by stating:

(*a.*) The classification made by act 173 is proper, and not to state the tax in this case would be simply a variation in one of the incidents of taxation.

(*b.*) In this case the taxes are fixed in the constitution, all other taxes being fixed by the legislature, which really calls for a different requirement in this respect.

X.

The Neglect to Provide for Equalization of the Property Assessed Under Act 173.

By the constitution, equalization is granted of the assessments in the several counties, upon property generally taxed. The property taxed under act 173 does not participate in this equalization:

1. In view of the Michigan system, this difference does not deprive of any right secured by the fourteenth amendment. All property in both classes is required to be assessed at its cash value, and proper proceedings of review are provided to secure uniform assessments, and the board of state tax commissioners is constituted for the purpose of supervising and equalizing all of the assessments of the state. Under these facts, the question is ruled by the case of *Cummings v. National Bank*, 101 U. S., 153, 160, in which it was held that the Ohio system which required all property to be assessed at or in proportion to, its value, and provided boards of equalization for certain, but not for all property, was constitutional.

It is sought to distinguish this case from the case of *Cummings v. National Bank* by indicating that in Michigan the state has recognized the practice of undervaluation, and except as affecting the railroad property, has neutralized it by processes of review and equalization. We insist that in this regard the Michigan system cannot be distinguished from the Ohio system, at issue in that case, and in that case the fact that boards of equalization were in certain cases provided is equally a recognition of the prevalence of undervaluation there, and in that case the undervaluation did, in fact, exist.

The statutes which, in Michigan, seem to recognize the possible existence of assessment for taxation purposes, other than at value, were passed many years ago. In 1899 a board of state tax commissioners was provided for the purpose of bringing all property in Michigan to its cash value, for purposes of taxation, and in 1901, when act 173 was passed, about 36 per cent. had been added to the previous assessments, and all assessments in the state were practically at value. This disposes conclusively of the claim based upon legislative recognition of undervaluation.

The recognition by statute of the necessity for equalization and for review, neither before nor after act 173 of 1901, determined that there was undervaluation any more than that there was overvaluation. The process of equalization

was for the purpose of reducing all assessments to the same basis, and was equally necessary where property was over-assessed as where it was underassessed.

2. Equalization of the kind claimed to be necessary by complainant is not only not necessary, but not proper in this case. The equalization granted to the other property is not for the purpose of affecting values, but is for the purpose of equitably distributing the state tax among the several counties. So far as that tax is simultaneously spread upon different properties equalization is appropriate, but no taxes are simultaneously spread upon that property and upon that taxed under act 173. The taxes assessed under act 173 are distinct and separate, and to extend the process of state equalization, as now had in Michigan, to the property assessed under act 173 would be a meaningless proceeding.

3. The same board makes the assessment under act 173 as supervises and places final assessments upon the property assessed generally throughout the state, and the same discretion operates upon the assessments of both classes, which is in itself a process of equalization.

4. The only place in which equalization would be effective would be where it is made to affect individual assessments, and equalization of that kind is as fully accorded to property assessed under act 173 as to property generally assessed. A review for the purpose of correction of assessments in each case is granted—in the one instance in the township before a township board of review; in the other instance before the state board of assessors.

5. Complainant sustains its claim of the necessity of equalization by two cases: *Railroad & Telephone Company v. Board of Equalization*, 85 Fed., 302, and *Nashville, etc., R. R. Company v. Taylor*, 86 Fed., 168.

These are both decisions by Judge Clark, of the middle district of Tennessee, and are not authority for the proposition claimed, as

(*a.*) In neither of them is the question decided. In one, the court expressly limits its decision to the question of whether it possessed jurisdiction; in the other, the hearing was simply preliminary upon the granting of a temporary restraining order;

(*b.*) The question is only considered as bearing upon the necessity for construing the state constitution, as authorizing equalization, and as the court holds that equalization was required by the constitution, it could not have determined the system invalid, as not providing for equalization;

(*c.*) In that case taxes were simultaneously spread upon the different classes;

(*d.*) There was there no common board to supervise the assessments;

(*e.*) Judge Clark was overruled by the decision of Judge Taft, in *Taylor v. Louisville & N. R. Co.*, 88 Fed., 371, where the collection of a portion of the tax was restrained, and the remainder held valid;

(*f.*) The state constitution there passed upon was somewhat different from that of Michigan, in that it required that no one species of property from which a tax shall be collected shall be taxed higher than any other species of property of the same value.

XI.

Violation of the Uniformity and Cash Value Provisions of the State Constitution.

The state constitution requires all property, both that assessed under act 173, and that assessed generally, to be assessed at cash value. This we understand to mean that uni-

formity of cash value assessment was required in every class. Act 173 in no way violates the requirement.

1. Assessments of property for taxation have always been required to be at cash value. Under that requirement, deductions, such as of debts from credits, have always been permitted from one class of property, while not granted to another. When cash value was required in the assessment of railroad property, it was intended to be cash value of that character previously required and recognized by the constitution and by statute.

2. If debts constitute an element of a person's or a corporation's property, and their deduction from credits a method of valuation, then, instead of act 173 being unconstitutional, the general tax law which permits the deduction, and therefore permits assessment at something different than cash value, would be unconstitutional. The result is that the deduction of debts from credits is not a rule of value, but that assessment at cash value takes place whether that deduction is granted or not.

3. The deduction is nothing more or less than an exemption; it does not affect or enter into the value of the property which is taxed, but constitutes simply the omission of a specific item of property. This is the result of the late case of *National Loan & Investment Company v. Detroit*, 136 Mich., 451, where the statutes permitted mortgages belonging to building and loan associations to be deducted from their assessments, which was objected to as violating the requirement of assessment of property at cash value. The objection was not sustained, the court holding that the deduction was an exemption, and within the discretion of the legislature.

4. The constitution was amended for the express purpose of permitting the passage of just such an act as 173. The

Atkinson bill had been previously passed, and declared unconstitutional. The governor, in convening the legislature in extra session, for the purpose of proposing amendments to the constitution, specified that the session was called for the purpose of permitting the passage of just such an act as the Atkinson bill had been. In regard to the inclusion of credits, act 173 is exactly like that bill, and therefore is not open to objection.

5. The state court, in *Board of Education v. State Board of Assessors*, 133 Michigan, 120, determined that, in the enactment of act 173, the legislature was well within its powers. It also determined that it was bound by the contemporaneous legislative construction of the constitutional amendments, as evidenced by act 173, and this court should be likewise influenced by that construction.

6. Though the act were defective in not providing for the deduction of debts from credits in the same manner as given in the general law, it would only be invalid in so far as it prevented the deduction, and the remainder would be valid and enforceable.

Supervisors *v.* Stanley, 105 U. S., 305.

For the reasons stated, we submit, that the classification made by act 173 is proper and sufficient, and that the differences in the incidents of taxation made by the statute, are such as could properly be made by the legislature when once the property subject thereto was properly classified, and that the judgment of the circuit court should be affirmed.

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